Supreme Court, U.S.
FILED
NOV 10 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. 71-270

KEN AKER, INC., a corporate citizen of West Virginia,
Petitioner,

v.

GIRARD TRUST BANK, a corporate citizen of Pennsylvania,
Respondent,

PETITION FOR REHEARING OF ORDERS ON PETITION FOR WRIT OF CERTIORARI (TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA) UPON SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER NOT PREVIOUSLY PRESENTED.

CERTIFICATE OF COUNSEL

The undersigned, counsel for petitioner, hereby certifies that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

Horace S. Meldahl

Horace S. Meldahl, Davidson Bldg.
Charleston, West Virginia 25301

SHAFER PRINTING COMPANY, CHARLESTON, WEST VIRGINIA

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I have asked a clerk of the Supreme Court of the United States if any explanation has been assigned for denying the writ of certiorari upon the original application, and have been told that none was given. It is therefore like groping in the dark to imagine the reasons. The petition for certiorari was denied October 26, 1971.

It is likely that the Honorable Justices have assumed that the record certified by the circuit court clerk tells the whole story though it does not. because the courts below do not make some matters parts of the record even upon request. Yet they may be substantiated by sworn testimony of persons present.

All members of the Supreme Court of the United States are familiar with the statutes creating civil liability and even making it criminal to deprive any persons "under color of law" of civil rights guaranteed under the United States Constitution. Section 1, Amendment XIV prohibits any State from making or enforcing any law which abridges the privileges or immunities of *any person* by depriving him of life. liberty or property without due process of law, and to deny any person within its jurisdiction the equal protection of the law. Amendment VII provides "In suits at common law, where the value of controversy shall exceed twenty dollars, the right to trial by jury as explained in the following paragraph.

At the pretrial conference on June 4, 1968 the trial Judge gave Girard the privilege of amending its pleading. and it did so. Whereupon Ken Aker in its answer asked for trial by jury, and the clerk of that court set the case up for jury trial as shown by a photocopy of his docket filed at the conclusion of this petition for rehearing. Yet the trial Judge ignored this stating, "and this case came on for trial pursuant to the pretrial conference of this Court entered on June 4, 1968." Appendix II: page 66. Ken Aker contends that it has been deprived of civil rights guaranteed by the United States Constitution in this and other respects herein mentioned and referred to, and asks that the original petition for certiorary be reread and considered in conjunction with this petition for rehearing same.

It has been impossble for Ken Aiker to have all pertinent parts of the record printed in an appendix because it has been ruined financially by the wrongful actions of Girard in the many respects complained of in this cause. After many years of success in its business and the establishment of an excellent reputation which enabled it to borrow large sums of money and acquire an enormous amount of property on credit, it no longer enjoys the ability to do either because of the untruthful charges made against it by Girard in this matter, which if known stand disproved. Certain material parts of the record not previously referred to and facts connected therewith are herein cited. All of Ken Aker's property and assets have now been taken wrongfully by Girard.

When the final order prepared by Girard's attorney was was submitted to counsel for Ken Aker, both made a trip to the court house to see the Judge because it did not show a specific objection to the fact that counsel for Ken Aker had been denied an opportunity to make a final argument and summation. The final order entered September 14, 1970, Appendix II, page 68, shows at pages 66-67 that the testimony had been concluded January 9, 1969, twenty months and five days earlier. The trial Judge declined to change the order saying the provision at the bottom of page 67 "to which decisions and rulings of this Court and the judgment rendered thereon the defendant did object and except" provided full protection. It seems to counsel for Ken Aker that this omission was responsible for the Supreme Court of Appeals of West Virginia failing to grant a writ of error on the two applications therefor.

This morning, October 29, 1971, counsel for Ken Aker asked the trial Judge if he remembered the objections to

the final order because it did not show that an opportunity to make a concluding argument and summary had not been afforded prior to the rendering of the decision as had been promised at the time the testimony was concluded, and the five or more times during the twenty months intervening counsel for Ken Aker had been to ascertain from him when he would be ready to give this case further consideration, and being told each time by the Judge that he didn't know. The trial Judge stated that he remembered about the objection on the ground stated, to the order, but did not recall about the several enquiries made at the motion hour. He said there was nothing he could do about it now. Opposing counsel could verify about the objecton if he would, and the Judge would probably acknowledge it to the Supreme Court if a justice thereof wrote him a letter enquiring about it. At the time of the trial opposing counsel was president of the local bar association, and under a local custom commonly presided in place of the Judge whenever the latter had occasion to be absent.

Upon oral applications to the Supreme Court of Appeals of West Virginia no record is made of what is said, so there is no way of showing all of the grounds assigned, but they were substantially the same as set out in this and the previous petitions to the Supreme Court of the United States. The disposition made by the State Supreme Court was no different than in *Mathews et al.* v. *West Virginia ex rel Hamilton, Prosecuting Attorney*, 320 U. S. 707, No. 155 which Your Honors reversed, the material facts of which are set out in the original petiton and final order in the appendix in this cause.

According to the testimony of Girard's chief witness, McGarrigan, Girard claimed only $53,001.55 due it after it had applied $38,120.36 all of which was realized from

its sale of mobile homes except $876.40 derived from insurance cancellation, although its complaints demanded $56,506.38. Appendix 1, page 46. Adding the $53,001.55 and $38,120.36 together places the orignal amount claimed at $91,121.91 against the thirty mobile homes. This did not take into account the original down payments or subsequent payments which were above that aggregate.

At the time Girard changed its policy and started this trouble it held $28,000 in a dealer reserve account belonging to Ken Aker. In the meantime it had foreclosed upon a number of other mobile homes illegally and charged up alleged deficiencies never explained reducing that reserve to $4,202.18 and $1,291.98 interest allowance thereon, a total of $5,494.16 credit still admittedly due Ken Aker, as shown by statements received from Girard under date of August 31, 1971 attached at the end of this petition, yet at the time of the trial Girard acknowledged only $1,291.98 in said account. Original reply to defendant's counterclaim. Appendix II, page 48.

Although the "Blue Book" is accepted in the mobile home trade as a standard valuation appraisal accepted generally by financial institutions its introduction was rejected by the trial Judge. Mr. Kenneth Honaker, president of Ken Aker, who had been in the moble homes business for many years, placed a valuation upon the mobile homes involved in this matter repossessed by Girard at $96,000 at the time of resale. A number of them had been repaired and refurbished for resale, and had billed Girard therefor in the amount of $8,199.73, which was ignored by both Girard and the Court. Petition for Certiorari page 19. He obtained bank commitments which enabled him to offer Girard $66,000 for the mobile homes, but it demanded $71,408.76, yet it later sold those mobile homes for $39,501.25, re-

fusing to let Ken Aker bid upon either the 22 sold to Dick Moore, or the 8 sold to others, which was also illegal. As a matter of fact they could be foreclosed only singly, and Ken Aker was entitled to bid upon each. One mobile home sold in the group of eight for $11.301.25, was practically new and by itself was worth $7.000.00. Surely it should have been singled out and sold separately even under the Pennsylvania Uniform Commercial Code. The only way any of them could be foreclosed legally was according to the applicable statutes of West Virginia and North Carolina, which the Court's final order shows was not even considered, as the Court says it based its decision entirely upon the Pennsylvania Uniform Commercal Code.

At one time during the trial the Judge became very impatient with witness Buksi for not having certain records in court in obedience to a subpoena duces tecum which had been left at his home late Friday night while he was away, and which required going through an enormous amount of records with which he was not familiar, and the person in charge thereof was away. He was faced also with the necessity of preparing Saturday for religous services Sunday as head of the religious denomination of which he was pastor. When a motion was made at the first opportunity Monday, the Judge said he probably would have sustained a motion to quash the subpoena had it been made the previous Saturday, but counsel for Ken Aker had not heard about it in time to do so then. The trial was then recessed until those records were brought it, which was very disconcerting to both Mr. Buksi, and counsel for Ken Aker. Record, page 530. Our court reporters do not include in their transcripts all that occurs in such incidents.

The summary of pleadings in the Memorandum of Opin-

ion is likely to give the impression that they recite facts, but some of the allegations are unquestionably contrary thereto as the decision of the Court plainly shows, the judgment awarded being for $12,524.10 less than Girard demanded, without taking into account interest upon this amount included in the total judgment. It is believed that it was improper to include interest, even if the judgment had been proper, for the twenty months the Judge took to handle other business of the court, rather than render his decision immediately.

The Court found the deficiency balance on mobile homes listed in schedules A and B $33,916.81, and schedule C $6,525.09, total $40,591.90, which was $16,011 less than the $56,506.38 Girard originally demanded. Girard had no right on any theory to refuse to receive bids from Ken Aker, or to demand that amount in excess of what the trial Judge found due it as a condition to a settlement. If Girard had not changed its policy, and had allowed Ken Aker to have resold the mobile homes at retail in the customary manner, as did Michigan National Bank, neither Girard, Ken Aker nor the original retail customers would have sustained appreciable losses.

The trial Judge likewise erred in refusing to award Ken Aker judgment upon its counterclaim for losses it sustained as a result of Girard's action and defamatory conduct accusing Ken Aker of double financing when it was Girard who was solely responsible for holding up payments and titles, as was conclusively shown by evidence Girard's witnesses did not deny.

Furthermore the sorrowful losses caused the retail customers by Girard accelerating entire balance upon failure to pay a single payment or at most two payments as soon

as due, during a period of exceptionally unfavorable conditions in the coal fields, was in itself unconscionable and inexcusable, for a bank that had hundreds of millions of dollars and was continuing to make other loans, and especially a bank established upon the fortunes in anthracite coal lands derived from its founder Stephen A. Girard.

Some consideration must be shown for the struggling poor people in America, or else there will be an upheaval hitherto unknown. The decision of the Supreme Court of the United States that private property cannot be taken without just compensation, and using government money to buy slaves and give them their freedom was not arquiring them for a public purpose, which resulted in our Civil War and the loss of many lives and many times as much money, should not occur again. It is time for our courts to recognize an obligation to administer justice and place human rights above the greed of the wealthy. If our Civil War had not resulted in the abolition of slavery the slaves by now would have so outnumbered other inhabitants that they would have been able to revolt and make others their slaves as happened in ancient Rome. "Therefore get wisdom, and with all thy getting get understanding."

If the NON RECOURSE provision of the Financing Agreement is not interpreted as running from the dates of each transaction it could not have had any appreciable value. It should therefore be construed according to its terms, rather than misinterpretations of any parties or others. What Mr. Buksi might have supposed at the time his discovery deposition was taken could not have been controlling. The conduct of Girard's witnesses was not consistant with its hindsight interpretation when it was interested in getting all it could. Mr. Honaker, whose approval was necessary to obtain Ken Aker's signature, did not

take the NON RECOURSE provision to mean anything other than what it said, NON RECOURSE. It should be so construed as a matter of law.

SUMMARY

In a certain case the judge asked the sheriff why he did not have a witness in court he had been ordered to bring. The sheriff answered there were twelve reasons, first because he was dead and buried. The judge said never mind the others.

In the present case there are several reasons, each of which should be equally sufficient for the Supreme Court granting this and the preceding petition, the evidence in regard thereto being undisputed.

First, the Court below says unequivocally that its decision was based upon the Uniform Commercial Code of Pennsylvania, yet the evidence shows conclusively that all of the deferred purchase money agreements sued on were made between Ken Aker and retail customers in West Virginia and North Carolina, and were governed by the laws of those states, those customers knowing nothing about any agreements between Ken Aker and Girard, which did not necessarily apply anyway, as Ken Aker could have sold all of said instruments to Michigan National Bank or any other finance company just as well, and the customers could not be deprived of their equities without foreclosure under the laws of West Virginia, the provisions of which could not be waived, and North Carolina equally required, and they could not be commingled, as was done, nor foreclosed other than singly as they were sold to the retail customers in the first place, so that the whole transaction was illegal

and void, and there was no way of determining a deficiency, nor of Ken Aker resorting to a deficiency claim against its customers.

Second. The notice Girard sent to Ken Aker of its intention to accept Dick Moore's offer at 9:00 A.M. November 4, 1966, mailed from Philadelphia, Pennsylvania November 1, 1966, in nonsense met the required ten days notice. Even if it were true that Girard had told Ken Aker's counsel that it intended to sell the mobile homes at some time undetermined it would not constitute legal notice under any law. See paragraph commencing at the middle of page 25 of the petition for certiorari.

Third, Denial of trial by jury.

Petitioner therefore prays that a rehearing of orders on petition for the writ of certiorari upon substantial grounds available to petitioner not previously presented, hereinbefore set out may be granted, and that the original petition for writ of certiorari to the Circuit Court of Kanawha County, West Virginia and Appendix I and II thereto may be reviewed and considered in conjunction therewith, and the prayers thereof granted, rights guaranteed under the United States Constitution having been denied. It is as much a denial of *due process* for the United States Supreme Court to deny a petition for writ of certiorari without reasons as for lower judicial and administrative bodies to do so.

Horace S. Meldahl

Horace S. Meldahl, Counsel for Ken Aker, Inc.
210 Davidson Bldg., 910 Quarrier Street,
Charleston. West Virginia 25301

CERTIFICATE OF SERVICE

The undersigned, Horace S. Meldahl, hereby certifies that he has this 27th day of November, 1971, served the foregoing petition for rehearing of orders on petition for writ of certiorari (to the Circuit Court of Kanawha County, West Virginia) upon subtantial grounds available to petitioner not previously presented, upon Girard Trust Bank, by delivering in person three copies thereof to James Knight Brown, counsel for said Girard Trust Bank, at his offices on the 16th floor of the Kanawha Valley Bank Building, Capitol and Lee Streets, Charleston, West Virginia 25301.

Horace S. Meldahl

Horace S. Meldahl, Counsel for Ken Aker, Inc.,
210 Davidson Bldg.
Charleston, West Virginia 25301

GIRARD BANK
Philadelphia PA

Ken Aker, Inc.
Box # 21
Charleston, W. Va.

3247

Dealer's Reserve Statement

Account No.	Charges	Credits	Date	Balance
		Bal. Forward	AUG 31 71	4,202.18 CR

GIRARD BANK
Philadelphia PA

Dealer's Reserve Statement

GIRARD BANK
Philadelphia PA

Ken Aker, Inc.
Box # 21
Charleston, W. Va.

3247

5% reserve on 10 yr. Mobile home contracts

Dealer's Reserve Statement

Account No	Charges	Credits	Date	Balance
		Bal. Forward	AUG 31 71	1,291.98 CR

GIRARD BANK
Philadelphia PA

GIRARD BANK
Philadelphia PA

JURY _____ ACTION

CIRCUIT _____ COURT

CIVIL DOCKET

Sheet No. 1

CASE NO. [illegible]

Girard Trust Bank Plaintiff vs. Defendant Ken Aker, Inc.

James K. Brown Attorneys — Horace S. Meldahl Attorneys

[illegible] McClung Attorneys — Attorneys

DATE	PROCEEDINGS	Cash Book No.	Page No.	Plaintiff Costs	Defendant Costs
	Sum. & 2 copies; Complaint with exhibit attached	[illegible]	[illegible]	[illegible]	1 [illegible]
	Return				
	Answer				
	Pre-Trial Order; Order; Motion and Counterclaim				
	Order				
	Reply of plaintiff to Counterclaim of defendant				
	Interrogatories to Ken Aker, Inc., a corp. and Request for Admissions and Motion and Notice with return				
	Sub. & 2 copies for plaintiff; Request for Admissions with Exhibit No. 1 and 2 attached and Notice of Depositions with return				
	Request for Admissions				
	Answer of Ken Aker, Inc to Interrogatories and Request for Admissions				
	Order				
	Sub. & 5 copies for plaintiff; By Cash	27	120		50
	Sub. & 15 copies for defendant; By Cash	27	122	3	75
	Sub. & 1 copy for plaintiff; By Cash	27	125		25
	Discovery Deposition of Michael Lawrence Buksi; Discovery Deposition of Kenneth (C.K.) Honaker and Notice of Filing of Deposition with return				

JURY ACTION Sheet No. 2 **CIVIL DOCKET** CASE NO. 7[illegible]

CIRCUIT COURT

[illegible] Bank Plaintiff vs. Defendant Ken Aker, Inc.

[illegible]wn - A. Keith McClung Attorneys Horace S. Meldahl Attorneys

Attorneys Attorneys

NOTATION DATE	PROCEEDINGS	Cash Book No.	Page No.	Plaintiff Costs	Defendant Costs
	Amended Complaint				
	Motion to Dismiss and Answer adopting the foregoing caption and presenting defenses under rule 12(b) and Counterclaim				
	Transcript, Volume I				
	Reply of plaintiff to Counterclaim of defendant				
	Issued Sub. & 20 copies for defendant; By Cash	27	191		5 00
	Sub. & 3 copies for plaintiff				
	1 Sub. Duces Tecum & 2 copies for plaintiff; By Check & Cash	27	192	1 25	
	1 Sub. Duces & 2 copies for plaintiff; By Check	28	1	50	
	Plaintiffs Exhibits No. 1 to 64 inclusive; Defendants Exhibits No. 1, 2, and 3				
	Sub. & 1 copy for plaintiff; By Cash	28	3	25	
	Sub. & 1 copy for plaintiff; By Cash	28	3	25	
	Transcript; Volume II; Transcript, Volume III; Exhibits				
	Order [illegible] letter of Memorandum or Opinion dated August 3, 1970, attached				
	Notice of Filing Transcript and Appeal; By Cash; (Clerk's fees for indexing record to Supreme Court of Appeals); Petition to Supreme Court of Appeals for Writ of Error of Ken Aker, Inc., a W.Va. Corp.	29	188		5 00
					CIRCUIT
	Order dated the 14th day of June, 1971, from Supreme Court of Appeals refusing appeal on second [illegible]				

JRY _____ ACTION

[illegible] TRUST BANK

_____ COURT

CIVIL DOCKET

CASE NO. 7444

[illegible] K. Brown Plaintiff vs. Defendant Ken Aker, Inc.,

[illegible] Keith McClung Attorneys — Horace S. Meldahl Attorneys

_____ Attorneys — _____ Attorneys

OTATION DATE.		PROCEEDINGS	Cash Book No.	Page No.	Plaintiff Costs	Defendant Costs
1971						
[illegible]	19	Record in accordance with Notice of Appeal was transmitted to United States Supreme Court by delivering to Horace S. Meldahl				
Nov	1	Order of Supreme Court of the United States refusing petition				

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA SS:

I, Jack Kinder, Clerk of the Circuit Court, of Kanawha County.West Virginia, do hereby certify that the foregoing three (3) Sheets are true copies of the Civil Docket Sheets in the Civil Action of Girard Trust Bank Vs., Ken Aker, Inc., Civil Action No. 7444

Given under my hand in the seal of said Court this 5th day of November, 1971

Jack Kinder CLERK
Circuit Court of Kanawha County
West Virginia